

E-Discovery and Public Relations Practice: How Digital Communication Affects Litigation

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Abstract

Practicing ethical public relations means keeping client confidences. However, when organizations face litigation this promise can be hard to keep. Having a working knowledge of the litigation process has become extremely important as public relations becomes an increasingly multifaceted practice in organizations that face a variety of issues and crises. One of the most important and relevant legal issues that is likely to affect public relations work is e-discovery. This paper examines e-discovery issues, and how this litigation process potentially affects the public relations profession. An overview of the Federal Rules of Civil Procedure and the Federal Rules of Evidence are provided along with an in-depth analysis of cost, access, confidentiality, and international issues that affect the e-discovery process. The paper concludes with five issues with discovery law that PR practitioners should know and be prepared to work within during the next decade.

Introduction

PR practitioners frequently help organizations on a variety of issues from traditional media relations to engaging with publics on social media. However, as public relations increasingly becomes a wider and established presence in organizations, their ever-present role means that litigation issues more than ever will affect public relations practice. One major issue that affects modern public relations is discovery. During a lawsuit discovery is used to find relevant evidence that can be admissible at trial. Because public relations work frequently discusses crisis, issue management, and even general day-to-day business, public relations work may be subject to discovery requests. Since public relations practice alone does not enjoy legally recognized privilege with clients, and because social and electronic media produces a prolific amount of internal communications, public relations work may have high evidentiary value. This public relations work product can be used as evidence in U.S. courts, and public relations practitioners may find themselves at the witness stand discussing their online communications. Because of that, public relations practitioners should have a working knowledge of e-discovery, short for electronic discovery, which is the process used to obtain electronically information during civil litigation.

E-discovery is the nexus where an organization's managerial, communication, legal, and technological components intersect. It can be an expensive process that has major managerial, communication, legal, and technological consequences. However, lawyers and courts have

struggled to apply traditional discovery rules, crafted in a pre-internet age, to the growing amount of electronically stored information (ESI) (Barnett, 2009-2010). This resulted in amendments to the Federal Rules of Civil Procedure in 2006 and 2015 as well as many court decisions that attempt to sort out different applications of federal law to ESI (Garrie, Duffy-Lewis, Gillespie, & Joller, 2009-2010). The issues that emerge in ESI discovery revolve around storage of information, confidentiality, and shifting expectations of privacy depending upon a country's laws.

This provides an overview of e-discovery in modern U.S. litigation, and analyzes the issues public relations practitioners may confront concerning electronic communication as evidenced in civil cases. Using legal analysis of federal civil procedure and evidence rules, case law, and statutes, this paper shows that issues of e-discovery cost, ESI access, PR-client confidentiality in work product, and international discovery laws are important factors in litigation and ESI. From this analysis of e-discovery laws and recent trends this paper concludes with five important suggestions for public relations practitioners.

The Rules

In law, procedural rules are extremely important. Knowing what to do frequently means the difference in winning or losing a lawsuit. While procedural rules are left to lawyers to navigate, it is important for public relations practitioners to understand the underpinning of civil procedure and evidence to appreciate the complexity of the e-discovery process. While public relations practitioners will not have to use these rules per se in their practice, it is highly beneficial to anyone working for an organization facing litigation to understand the highly regimented process that govern a lawsuit. What follows is a brief overview of the two major procedural rules that govern civil lawsuits in America—the Federal Rules of Civil Procedure and the Federal Rules of Evidence.

Discovery and the Federal Rules of Civil Procedure

To fully understand the issues in e-discovery it is important to know the fundamentals of the discovery process generally. After all, e-discovery, while technologically different, is still governed by the general rules of discovery. Discovery in all forms is the process in which parties collect testimonial and documentary evidence for civil cases in the United States prior to trial. This evidence is collected from opposing parties through depositions, interrogatories, and subpoenas. Since the twentieth century the discovery process, particularly in civil cases, has become an increasingly time consuming process in pre-trial practice. Wading through documents to find valuable evidence is an expensive task, which is one of the reasons the cost of litigation has increased. The rules governing discovery in the federal court system are governed by the Federal Rules of Civil Procedure.¹ Although the Federal Rules of Civil Procedure have gone through several revisions (e-discovery being first addressed in 2006 and again in 2015) the rules remain fairly consistent, allowing for predictability for the litigation process. Sometimes states use procedure that is similar to the Federal Rules of Civil Procedure. However, the Federal Rules of Civil Procedure only apply to federal courts; states are free to develop procedural rules as they wish. While many states follow some version of the Federal Rules of Civil Procedure, a sizable minority has their own unique procedural rules (Oakley, 2002/2003).²

Civil discovery is addressed in the Federal Rules of Civil Procedure's Title V Disclosures and Discovery, which contains eleven specific rules for the discovery process. The Federal

Rules of Civil Procedure Rule 26 entitled “Duty to Disclose; General Provisions Governing Discovery” is the most detailed of the rules on discovery. The material available for discovery is broadly defined under the Federal Rules of Civil Procedure. Rule 26(b)(1) “Discovery Scope and Limits” defines the scope of discovery as:

Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable (Federal Rules of Civil Procedure, 2016, p. 39).

This broad scope of discovery is important because it shows that while discovery in a civil litigation allows parties access to massive amounts of information, it also presents a process in which parties’ pre-trial practice can incur massive expenses for the client.

Discovery is not just a process of unregulated total transparency; it is a particular process in which lawyers must abide. Rule 26(a)(1)(A)(i)-(ii) states that in a civil lawsuit parties must make mandatory disclosures “without awaiting a discovery request” including the names and contact information of anyone with “discoverable information” and copies or “description by category and location” of documentary evidence the “disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment” (Federal Rules of Civil Procedure, 2016, p. 36).³ This initial information required under Rule 26(a)(1)(A) along with discovery plan must be provided to the opposing party within 14 days after the parties’ Rule 26(f) conference.⁴ At this 26(f) conference the Federal Rules of Civil Procedure require the parties in a lawsuit to discuss several matters including potential settlement of the case, logistical issues involving the mandatory disclosures in Rule 26(a)(1)(A), and determine any potential “issues about preserving discoverable information; and develop a proposed discovery plan” (Federal Rules of Civil Procedure, 2016, p. 43).⁵

The discovery plan is an important component to pre-trial practice, and has particular significance for e-discovery because it requires parties to address how electronic evidence should be gathered and preserved. The Federal Rules of Civil Procedure Rule 26(f)(3)(A-F) gives specific instructions regarding the discovery plan that include timing of disclosure, identification of location of discoverable material, electronic preservation, discussion of items that are not discoverable under the Federal Rules of Evidence Rule 502 (Attorney-Client Privilege and Work Product), limits on discovery, and an identification of what orders the trial court judge should issue.⁶ After the Rule 26(f) conference the parties to the lawsuit will be issued a scheduling order that outlines the timeline for discovery and provides deadlines for amendments to the lawsuit under Rule 16(b).

The Federal Rules of Civil Procedure recognizes that collecting massive amounts of discovery can be an onerous task. For that reason, the Rule 26(b)(2)(B) says that there are “limitations” on electronic information that is subject to discovery (Federal Rules of Civil Procedure, 2016, p. 39). In the case of electronic evidence, Rule 26(b)(2)(B) states that parties

“need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost” (Federal Rules of Civil Procedure, 2016, p. 39). However, this rule, saving parties from the expensive process of producing hard to obtain evidence, has limits. According to Rule (b)(2)(B), if a party wants to argue that an e-discovery request is too burdensome they must “show that the information is not reasonably accessible because of undue burden or cost” (Federal Rules of Civil Procedure, 2016, p. 39). Even then a court may still make the party produce the information. Like all rules and statutes, Federal Rules of Civil Procedure 26(b)(2)(B) does not provide concrete examples for when e-discovery requests become overly burdensome. Moreover, the rule places a great deal of subjective authority in the trial court judge to determine what information is needed and what is not. The Federal Rules of Civil Procedure does provide some guidance for when discovery in general is not needed; Rule 26(b)(2)(C)(i-iii) states that discovery should be limited when the materials requested are “cumulative or duplicative,” when the party seeking the discovery had “ample opportunity to obtain the information,” or when the material is outside the Federal Rules of Civil Procedure’s definition of discoverable material (Federal Rules of Civil Procedure, 2016, p. 39).

The Federal Rules of Civil Procedure address a variety of other discovery issues such as depositions (Rules 27 and 28, 29, 30, 31, 32), interrogatories (Rule 33), medical examinations (Rule 35), and admissions (Rule 36) (Federal Rules of Civil Procedure, 2016, pp. 44-55, 56-58). However, Federal Rules of Civil Procedure Rule 34 specifically deals with electronic issues of evidence gathering and preservation. Under Rule 34(b)(1)(A-C) a party has the right to request the production and inspection electronic information so long as the request contains a description with “reasonable particularity,” “specif[ies] a reasonable time, place, and manner for the inspection,” and “specif[ies] the form or forms in which electronically stored information is to be produced” (Federal Rules of Civil Procedure, 2016, p. 55). When this request is made the party that receives the request has 30 days to respond either to allow the request or object to it. When the request is for electronic information there is a special rule under the Federal Rules of Civil Procedure Rule 34(b)(2)(E)(i-iii) that states:

Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically stored information:

- (i) A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request;
- (ii) If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and
- (iii) A party need not produce the same electronically stored information in more than one form (Federal Rules of Civil Procedure, 2016, p. 56).

This rule suggests that the Federal Rules of Civil Procedure does not want electronic discovery to be overly complicated for the entity that possesses the information. However, problems arise when an organization does not have a set standard in keeping electronic data, and questions arise about what information is kept as part of normal business practices.

Compounding this problem of what information is discoverable is the fact that noncompliance with discovery requests can result in punishment. If a discovery request is made

or if a party fails to provide mandatory information the court can issue an Order Compelling Disclosure or Discovery on the noncompliant party. This can include an order for the noncompliant party to pay the opposing party's expenses, such as attorney's fees, that result from filing a motion to compel disclosure or discovery (*Cordance v. Amazon.com*, 2012; *Orrell v. Motorcarparts of America*, 2007). Under Federal Rules of Civil Procedure Rule 37(e), if there is a "failure to preserve electronically stored information" there can be sanctions imposed on the party at fault. These sanctions may include "measures no greater than necessary to cure the prejudice," but there may be a presumption that the "lost information was unfavorable to the party" (Federal Rules of Civil Procedure, 2016, pp. 61-62). Additionally, the judge may make the jury aware of this lost information at trial and can instruct them that they "may or must presume the information was unfavorable" (Federal Rules of Civil Procedure, 2016, p. 62). Another remedy is the judge can enter a dismissal of the case or enter a default judgment in favor of the non-offending party. However, under the Federal Rules of Civil Procedure noncompliance sanctions occur only when there are specific circumstances where there is a failure to take "reasonable steps to preserve" evidence and that lost ESI cannot be recovered (Federal Rules of Civil Procedure, 2016, p. 62). Furthermore, the Rule 37(e) requires ESI loss must prejudice the other party requesting the information. These specific requirements make it more difficult for courts to impose sanctions because it requires a party to fail to reasonably store information, and that the information prejudices the requesting party.

Federal Rules of Evidence and Admissible Electronic Evidence

Information sought by an attorney must have some relevance to a case. While discovery rules do allow for the examination of potential evidence, the Federal Rules of Civil Procedure does not allow attorneys carte blanche for examining material. While Rule 26(b)(1) states that discoverable material must be "relevant to any party's claim or defense and proportional to the needs of the case" it does not have to be admissible at trial (Federal Rules of Civil Procedure 26, 2016, p. 39). Admissibility of evidence at trial in federal court is governed by a separate set of rules known as the Federal Rules of Evidence. Adopted in 1975, the Federal Rules of Evidence consists of 67 rules that directly deal with evidence. The rules are approved by Congress and the U.S. Supreme Court, and may change to varying degrees year-to-year. States are free to develop their own rules of evidence, but many states use the Federal Rules of Evidence as a guide for their own evidentiary rules.

The core of the Federal Rules of Evidence is the balance between relevancy and prejudice. Under Federal Rules of Evidence Rule 401:

Evidence is relevant if:

- (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
- (b) the fact is of consequence in determining the action (Federal Rules of Evidence, 2016, pp. 3-4).

This is balanced against Rule 403, which is a rule that deals with excluding evidence for "prejudice, confusion, waste of time, or other reasons" (Federal Rules of Evidence, 2016, p. 4). That rule states that, "the court may exclude relevant evidence if its probative value [i.e. relevance] is substantially outweighed by a danger of one or more of the following: unfair

prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence” (Federal Rules of Evidence, 2016, p. 4). However, this balancing is done on a case-by-case basis by a judge. The practical implication is that some information may be discoverable under the Federal Rules of Civil Procedure Rule 26, but may not be admissible in courts under Federal Rules of Evidence Rules 401 or 403.

ESI can be admitted at trial so long as it is relevant under Rule 401 and not overly prejudicial under Federal Rules of Evidence Rule 403. However, if the ESI involves work with an attorney, Rule 502 specifically prohibits that information from being admitted into evidence unless the attorney’s client (not the attorney) provides a waiver. This includes attorney-client communication and attorney work product. So long as the content of the ESI is not subject to privilege it may be admitted into evidence. This is particularly true when electronic evidence shows an admission of fault. Federal Rules of Evidence Rule 801 bans hearsay evidence from being admitted into trial, but states that certain statements by a party or its representative may not be hearsay if those statements are admissions. That means that the party who made the statements may not even have to testify to have those statements admitted into evidence (Myers, 2015).

For ESI these rules mean that communications that are made online may be used against a party. However, one major issue for ESI evidence is authentication, which is governed under Federal Rules of Evidence Article IX. Authentication requires that evidence at trial must be presented in a specific manner. A witness must introduce the evidence at trial and testify to the evidence’s truth and accuracy; if a piece of evidence is not authenticated properly it will not be admitted. ESI presents unique authentication issues because of the way it is stored or presented at trial. Browning (2011) points out that in a variety of jurisdictions the authentication of ESI varies, and that sometimes opposing counsel attacks the authenticity of ESI. This frequently involves an objection of the use of printouts of websites or other online materials. However, according to Browning (2011) authentication frequently does meet minimum standards under Federal Rules of Evidence Rule 901, even for printout material, and is regularly admitted as evidence.

For public relations practitioners it not so important to fully understand every detail of the Federal Rules of Civil Procedure or Federal Rules of Evidence, but rather it is important to see how courts work in the litigation process. Facing a crisis or impending civil litigation a public relations practitioner should be prepared for a standardized process that is both costly and time consuming for an organization. These rules illustrate how organizational information (even information that may not be introduced at trial) can be disseminated. Organizations may face PR issues when depositions or other discoverable material that was meant for internal communication only finds its way into the public eye. Being aware that this type of disclosure of information is part of the civil litigation process is important because it allows PR practitioners to anticipate future communication issues ahead.

Issues in E-Discovery: What PR Practitioners May Confront

Even with the rules set forth in the Federal Rules of Civil Procedure and Federal Rules of Evidence, e-discovery is a matter that frequently is litigated in courts. The major issues in e-discovery revolve around cost of storage, access, privileged work product, and international law. Because PR practitioners' work increasingly involves social and digital media, they may find their communications subject to subpoena or even as evidence at trial. What these areas show is that courts are increasingly grappling with applying the well-established rules of civil procedure and evidence to new technological innovations. PR practitioners working with clients facing litigation will most likely deal with these issues.

Costs Associated with E-Discovery Requests

In the U.S. legal system, it is a longstanding tradition that each party pays its own costs of litigation. E-discovery, like all aspects of litigation, can be very expensive. In fact, the discovery process itself can be so drawn-out that some litigants end up settling their cases because the costs associated with preparing a case become too much of a burden. Federal statute 28 U.S.C. §1920(4) is interpreted by some to allow for e-discovery costs to be shifted to one party. Overfield (2013) points out that one of the problems of interpreting this statute is that the U.S. Supreme Court has not provided an approach to determining when to shift e-discovery costs. However, Overfield (2013) argues that courts have applied this shift more frequently than necessary and that a potential solution could be a narrow interpretation of 28 U.S. §1920(4) in light of the U.S. Supreme Court's decision in *Taniguchi v. Kan Pacific Saipan, Ltd.* (2012).

Courts fear that e-discovery costs may be used as a strategy because the responding party typically pays the cost of obtaining requested evidence. In fact, in 2011 the federal trial court for the Western District of Pennsylvania awarded over \$365,000 in e-discovery costs (that sum was later reduced on appeal) (*Race Tires America Inc. v. Hoosier Racing Tire Corp.*, 2011; *Race Tires America, Inc. v. Hoosier Racing Tire Corp.*, 2012).⁷ Because of the high costs associated with e-discovery, courts frequently hear cases about the burden of one party bearing e-discovery costs. The cost of e-discovery is related to the location of the information. ESI is frequently stored in the recesses of a computer (frequently referred to as backup data). In an analysis of the discoverability of backup data the federal courts have looked at the dual interests of a party's need for information versus the cost of obtaining that data. According to the federal trial court for the Southern District of New York this issue of discovery costs has led to "creative solutions" (*Zubulake v. UBS Warburg*, 2003, p. 316).⁸ These solutions include cost-sharing between parties and even placing the cost to the requesting party. This approach contravenes the legal convention that the party receiving the request for the discovery is obligated to pay the costs (*Oppenheimer Fund v. Sanders*, 1978). The U.S. District Court for the Southern District of New York created an eight-part test to determine when the costs associated with discovery can be shifted to the party requesting the information:

- 1) the specificity of the discovery requests;
- 2) the likelihood of discovering critical information;
- 3) the availability of such information from other sources;
- 4) the purposes for which the responding party maintains the requested data;
- 5) the relative benefits to the parties of obtaining the information;
- 6) the total cost associated with production;

- 7) the relative ability of each party to control costs and its incentive to do so; and
- 8) the resources available to each party (*Rowe Entertainment v. William Morris Agency, Inc.*, 2002, p. 429).

However, in *Zubulake v. UBS Warburg* (2003) the judge pointed out that these eight factors fail to take into account the “amount in controversy” or “the importance of the issues at stake in the litigation,” two issues that are mandated to be considered under Federal Rules of Civil Procedure Rule 26 (p. 321).

In *Zubulake v. UBS Warburg* (2003) the trial court warned, “courts must remember that cost-shifting may effectively end discovery, especially when private parties are engaged in litigation with large corporations” (p. 317). The same court warned against a common misperception that anytime e-discovery is involved that costs are automatically higher. Analyzing the types of electronic media that may be discoverable U.S. District Court Judge Shira Scheindlin found that there are five general types of data that are subject to discovery. In order of ease in accessibility they are: “active, online data” (“hard drives”); “near-line data” (“optical disks”); “offline storage/archives” (“just a bunch of disks”); “backup tapes,” and “erased, fragmented or damaged data” (*Zubulake v. UBS Warburg*, 2003, p. 319). In light of these technological categories and her criticism of the eight-factor test outlined in *Rowe Entertainment v. William Morris Agency, Inc.* (2002), Judge Scheindlin created a new test to determine cost shifting. It stated that e-discovery cost issues should be evaluated by looking at:

- 1) The extent to which the request is specifically tailored to discover relevant information;
- 2) The availability of such information from other sources;
- 3) The total cost of production, compared to the amount in controversy;
- 4) The total cost of production, compared to the resources available to each party;
- 5) The relative ability of each part to control costs and its incentive to do so;
- 6) The importance of the issues at stake of the litigation; and
- 7) The relative benefits to the parties of obtaining the information (*Zubulake v. UBS Warburg, Inc.*, 2003, p. 322).

This approach embraces some of the language in Federal Rules of Civil Procedure Rule 26, but it still is not the definitive test on e-discovery costs because this decision is from a trial, not an appellate, court. The test is also not meant to be cumulative; rather, the test attempts to answer the question of “how important is the sought-after evidence in comparison to the cost of production” (*Zubulake v. UBS Warburg, Inc.*, 2003, p. 322-323). However, it indicates that costs associated with e-discovery are directly related to parties’ finances, the necessity of the information, and the type of electronic material requested.

Some e-discovery requests are not even honored. Because e-discovery costs vary and each lawsuit has its own unique characteristics, e-discovery issues are resolved at the trial level on a case-by-case analysis. Sometimes courts place limits on what type of ESI is discoverable. In the federal trial court for the Eastern District of Missouri, a judge held that a party’s request for emails prior to June 18, 2008 that were only available using backup tapes was unduly burdensome to produce. In this case there were 5,880 backup tapes requested that examined 13,468 email accounts. The amount of time associated with getting this information (two and

half hours for each tape) and the cost (\$76.03 per hour) was deemed to be excessive (*Johnson v. Neiman*, 2010, p. *1). However, even with this heightened cost and time associated with this type of request the federal court also analyzed the purpose behind the request. In other words, high costs and time do not equate to a rejection of a discovery request; courts will also look to the necessity of the information. As Milburn (2007) points out, one of the best practices to have in anticipation of an e-discovery request is an easily accessible and organized storage of data. This not only helps with compliance of the discovery request, but also helps to respond to the request in a timely way.

A related issue to discovery request is what if the discoverable material is not available because of poor preservation practices. The U.S. Court of Appeals for the Second Circuit addressed this issue in *Chin v. Port Authority of New York & New Jersey* (2012).⁹ In that case the Port Authority did not place a “litigation hold” on certain discoverable material. The court held that actions in which evidence is not preserved might subject parties to sanction. However, this rule is determined case-by-case, and if a party is able to find the material in question from another source it is less likely that a court will impose sanctions or an adverse inference instruction to the jury.¹⁰

Analyzing ESI is also a costly and sometimes overwhelming process. In recent decades when discovery requests are made for ESI the volume of documents may be in the thousands, which creates logistical issues for parties. Sometimes search words are used to pare down documents. Additionally, computer software may be employed to focus the amount of documents needed. This software frequently referred to as Technology Assisted Review (TAR), or computer-assisted review, has become a norm in ESI discovery (*Moore v. Publics Group*, 2012; *Rio Tinto PLC v. Vale S.A.*, 2015). Determining what amount of information should be collected using TAR is frequently debated with some scholars arguing what is an acceptable amount (Grossman & Cormack, 2014; Schieneman & Gricks, 2013).

In practical terms these cases show that e-discovery is an expensive process that sometimes yields so much information that is difficult to analyze. However, the fact that the expense of e-discovery can be high it is important to note that in many cases this high cost is justifiable because of the nature of the lawsuit. As the next section shows, the volumes of ESI that can be obtained during discovery can not only create logistical problems concerning analysis, but also issues of reputation and image.

Access and Content of Social Media Accounts

During the discovery process, social media accounts have become an important source of evidence. These accounts provide insight into the day-to-day lives of litigants, and may serve to corroborate or contradict a party or witness’s statements. As social media accounts become more prolific it is important for public relations practitioners to be aware that organizational accounts, as well as accounts of specific employees, may become the source of evidence. For instance, in *Torres v. Lexington Ins. Co.* (2006) the U.S. District Court for the District of Puerto Rico dismissed a portion of a lawsuit based on social media postings that contradicted a plaintiff’s claim of mental anguish. A PR practitioner cannot protect clients’ social media by merely restricting privacy settings. A discovery request can allow access to social media content even if it is protected by the site’s privacy settings. Trial courts in the federal and state level have found that discovery requests can be applied to social media accounts regardless of the privacy setting

(*Nucci v. Target Corp*, 2015; *Ramano v. Steelcase*, 2010; *Tompkins v. Detroit Metropolitan Airport*, 2012).

Public relations practitioners are frequently asked to manage the online image of a client. However, this does not mean that public relations practitioners can “clean-up” an account during a lawsuit. In Virginia, the issue of social media account content was at issue in a 2013 case at the Supreme Court of Virginia.¹¹ In *Allied Concrete Co. v. Lester* (2013) the Supreme Court of Virginia analyzed whether the deletion of Facebook account and content after the commencement of a lawsuit was grounds for sanction. In that case the plaintiff sued the defendant for wrongful death of his wife stemming from an automobile accident. After the lawsuit was filed, the defendant wanted access to the plaintiff’s Facebook account including screen shots of his photos, comments on his Facebook wall, and other Facebook messages. The plaintiff’s attorney, through a paralegal, advised his client to remove certain content from his Facebook account, including photos that portrayed him in a potentially unflattering light. The plaintiff closed his account and later reactivated it. The reactivated account was missing 16 photos. Later the plaintiff denied having deleted his account during a deposition, and when the court requested emails between the lawyer and plaintiff regarding the Facebook account certain emails were intentionally left out. Because the plaintiff and his counsel colluded to remove discoverable content during the lawsuit the trial court sanctioned the plaintiff’s attorney for \$542,000 and the plaintiff for \$180,000 (*Allied Concrete Co. v. Lester*, 2013, p. 303).¹² Other federal and courts that have imposed sanctions when parties attempt to destroy ESI, such as destroying computer hard drives (*E*Trade Securities LLC v. Deutsche Bank AG*, 2005; *Metropolitan Opera Association, Inc. v. Local 100*, 2003; *Nartron Corporation v. General Motors*, 2003)

Gathering online content sometimes faces obstacles, however. A social media site may not be willing to provide content because of the federal laws that regulate them. Social media outlets, such as Facebook, are subject to the Stored Communications Act (SCA), which prohibits them from providing content about users (*Crispin v. Christian Audigier, Inc.*, 2010). Facebook states that the most it is able to provide is information about account holders, and, in some instances, restore older accounts that have been deactivated (“Third Party Matters,” n.d.). Browning (2011) suggests that lawyers may need to find out social media information by making very specific discovery requests, and have an awareness that social media sites are extremely restricted in what they can disclose. Moreover, an attorney or a surrogate attempting to gain access to social media accounts by sending a friend request once a party has representation raises ethical issues. That conduct violates rules that ban an attorney from contacting a person or party once he or she has retained counsel. Browning (2011) points out that even when unrepresented an attorney seeking access to a third party’s social media account may be running the risk of violating the American Bar Association’s Rules of Professional Conduct 4.1(a), which bans an attorney from making a “false statement of material fact” (American Bar Association Rule 4.1, n.d., para. 1; Browning, 2011).¹³

This is not to say that social media is always heavily protected. Private employee communications may inadvertently be included in the discovery of an organization’s data. The issue of employee communication made in the course of work is obviously work product that is discoverable. However, private communication may also be discoverable if they are made on work devices. This was the issue in *Rowe Entertainment Inc. v. William Morris Agency, Inc.*, (2002). In that case the court held that employees assume the risk that their private

communication may be discoverable when they use workplace devices to communicate. Additionally, the court reasoned that if private information was obtained during this process that it would likely be relevant to the underlying case, and that because the organization made no attempt to conceal private communication in paper documents, access to electronic communications should not be limited. Other cases seem to bear this out as well, and suggest that employee information stored on a workplace device may become the organization's property (Angevine, 2002; Bennett, 2009-2010; *Muick v. Glenayre*, 2002).¹⁴

It is important for PR practitioners to note that social media content, private and public, can be evidence at trial. Sometimes it requires formal discovery, but sometimes public posting can be gathered without a subpoena. Ethical considerations are part of the social media aspect of litigation. Lawyers or parties cannot use a ruse, or other unethical means, to gain access to a private account. However, this area of the law is evolving with new concerns over social media use during the trial, especially regarding juror selection. Despite this evolving nature of social media discovery, practitioners should take note that social media is part of the normal routine in lawsuits and that evidence from those accounts can play an important role at trial.

Privileged Work Product

Public relations practitioners frequently work in-house for clients. However, in-house or work-for-hire public relations does not limit the discoverability of physical and electronic public relations work product. Standards in public relations practice value the confidences of a client. In fact, the PRSA Code of Ethics states that loyalty is an essential part of public relations practice. Additionally, the PRSA Member Code of Ethics (n.d.) explicitly states that a public relations practitioner has special obligations under the "Safeguarding Confidences" tenet, which states a public relations practitioner is expected "To protect the privacy rights of clients, organizations, and individuals by safeguarding confidential information" (PRSA Member Code of Ethics, Safeguarding Confidences, n.d., para. 2). This obligation is further articulated by the PRSA Member Code of Ethics, which states that:

- A member shall: Safeguard the confidences and privacy rights of present, former, and prospective clients and employees.
- Protect privileged, confidential, or insider information gained from a client or organization.
- Immediately advise an appropriate authority if a member discovers that an employee of a client company or organization is divulging confidential information. (PRSA Member Code of Ethics, Safeguarding Confidences, n.d., para. 3).

These ethical codes that preserve client confidences lead to high levels of professionalism in the field and should be followed by public relations practitioners. However, during discovery public relations practitioners may not refuse to comply with discovery requests based on codes of ethics without risking sanction by a court. Discoverable material includes work product done on behalf of clients. No professional code of ethics, a claim of intellectual property ownership (of lack thereof), or claim that the work was done for internal purposes only can save work-product from being discoverable. The only exception to this rule is if the public relations work is conducted in a way that can fall into attorney-client privilege. The U.S. Supreme Court held that attorney-client privilege is recognized in work product done in anticipation of litigation

(*Hickman v. Taylor*, 1947). Work product done in anticipation of litigation receives the same type of protection under attorney-client privilege as discussions between a lawyer and a client. The U.S. Supreme Court recognized in *U.S. v. Nobles* (1975) that this work product privilege extends to non-attorneys when those non-attorneys are assisting in litigation preparation. This is especially true of in-house employee work done in connection with the legal counsel (*Upjohn v. U.S.*, 1983). This also can extend to former employees if those employees were also engaged in communication with legal counsel (Becker, 2003). Myers (2015) found that in lower federal courts there is some recognition of public relations-client privilege when it is associated with litigation issues. This type of privilege, when found, would most likely extend to work product done on behalf of a practitioner for a client.

Under the Federal Rules of Evidence Rule 502, privileged work product cannot be entered into evidence absent a waiver. Rule 502(g)(2) states “‘work product protection’ means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial” (Federal Rules of Evidence, 2016, p. 10). Public relations work done in context of litigation arguably is protected under work product attorney-client privilege. However, determining when that privilege exists is case specific. According to Myers (2015), the extension of attorney-client privilege hinges on several factors all of which analyze the proximity of a public relations practitioner to the attorney/legal department and litigation issues. However, it is important for PR practitioners to note that in discovery this privilege will likely be challenged, and public relations practitioners should be prepared to turn over information (including confidential information for internal discussion) regarding a client.

Merely because a work product is conducted because of litigation does not mean it is not discoverable. However, work product may be discoverable, even if they are produced during a time when litigation is anticipated, if they are part of the ordinary business of an organization (*Foret v. Transocean Offshore (USA) LLC*, 2010; *National Union Fire Insurance of Pittsburgh, Pa. v. Murray Sheet Metal Co., Inc.*, 1992). This is reflected in the Federal Rules of Civil Procedure Rule 26(b)(3)(A), which states that “ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative” (Federal Rules of Civil Procedure 26, 2016, p. 39). However, Rule 26(b)(3)(A)(i-ii) goes further and states that documents in anticipation of litigation (even those materials prepared by an attorney) may be subject to discovery if they are discoverable under Rule 26(b)(1) or when “the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means” (Federal Rules of Civil Procedure, 2016, pp. 39-40). This reality means that public relations practitioners should organize their work product for potential discoverability, and be ready to comment on work product should those materials become part of evidence at trial.

International Issues in E-Discovery

Public relations practice is increasingly international, and an organization may have multiple offices outside of the U.S. Because of this it is important for public relations practitioners to know that discovery issues are not dealt with in the same way in other nations. This difference may be the result of a different legal system and rules for civil cases. Sometimes the difference hinges on a different concept of personal privacy of individuals, and the requirements for storing and accessing data. Because of that, public relations practitioners should be aware that they might find themselves in a lawsuit with different evidentiary norms.

Compounding this problem is the incidences where public relations practitioners find themselves working for multi-national companies in which lawsuits occur between parties in different nations. In those lawsuits controlling law and jurisdiction will be more complex, and potentially more costly to clients.

One of the most important aspects of international e-discovery is that civil code jurisdictions, such as those found in continental Europe, are not a discovery-based legal system.¹⁵ Because of this, their e-discovery rules may be less developed than those found in the U.S. or other common law jurisdictions, such as the U.K. This does not mean these jurisdictions do not have ESI evidence, but it means that the process for obtaining this evidence is not the same as that found in common law jurisdictions and perhaps may be not permitted at trial. Sometimes U.S. litigants become frustrated with the role of evidence gathering in civil code jurisdictions (Hazard, 1999). In Norton Rose Fulbright's (2016) analysis of e-discovery issues for the year 2015, they note that in non-discovery jurisdictions (countries that have civil codes) there are other factors that may be present such as privacy issues, employment law, or regulations on data that prohibit access to certain ESI. Additionally, they note that in many European jurisdictions ESI may be located by government regulatory agencies or law enforcement.

In the U.S., the issues with e-discovery are made more complex when litigation involves other countries. In their analysis of U.S., U.K., Canadian, and Mexican discovery laws, Moure et al. (2010) found that even in countries where U.S. litigants frequently engage in legal issues e-discovery is a complex balancing of legal standards. In their analysis of foreign litigants in the U.S. Moure et al. (2010) found The Hague Evidence Convention or the European Union's Data Protection Directive, which may provide for more favorable discovery processes than the Federal Rules of Civil Procedure, are not used in place of the Federal Rules of Civil Procedure. Conversely, U.S. litigants who find themselves in foreign courts may find discovery rules that are very different than the Federal Rules of Civil Procedure. Of course, U.S.-based public relations practitioners may not be aware of the different parameters of international discovery laws. However, it is important that in a global communication practice that practitioners know that thinking of litigation purely from an American perspective can be problematic. Other nations may not have similar civil litigation process or even speech protections.

Implications for Public Relations Practice

Public relations practitioners should take note that e-discovery laws are evolving along with the innovations in technology. It is almost a given that in the coming years there will be new technologies that will provide more information that is useful for trial. It is also similarly certain that in the coming years technology will produce more data, which will result in a greater difficulty in culling relevant information for trial. However, e-discovery issues have particular importance for public relations practitioners. Based on the legal trends in e-discovery there are five issues that public relations practitioners should know:

Organizational cohesion is important. In the 21st century knowing the technology behind the communication is just as important as knowing the communication. Because e-discovery frequently involves what is stored as regular business practice public relations practitioners should know how an organization files and stores communications. During the discovery process this fact will become important. A major theme in law and public relations is that the best communication results occur when the legal and public relations departments work together to

create a strategic solution. However, e-discovery adds a new aspect to this because IT departments play an important role in the preservation and handling ESI. IT, legal, and public relations units within an organization should be in dialogue with each other about the maintenance, storage, and content of ESI. This will not only produce a more efficient result when a discovery request is made, but it allows for the organization to strategically plan for what materials an organization may need to draw from in anticipation of a crisis or impending litigation. Public relations practitioners are obviously the best equipped to produce content on behalf of a client. However, by knowing the legal and IT dimensions to communication they will be better prepared to what types of issues may arise during the discovery process, which may contribute to image maintenance or organizational crisis responses.

Environmental scanning is important. As these cases show, organizations frequently are faced with evidence that comes from social media, email, or other internal accounts. It is important for public relations practitioners to diligently work on what official messages are being distributed to the public. These public messages are not subject to the same privacy protection as internal or privileged communication. Because of that, public relations practitioners need to craft public messages with the expectation that they will be brought to light during the discovery or trial process. Similarly, public relations practitioners should pay close attention to internal communications within an organization. As the case law indicates, it is common for emails or other internal communication to become part of discoverable material and perhaps used as evidence at trial. Employees of organizations need to know that their expectation of privacy of these internal communications depends on their context (they may not be privileged), and that personal communications can frequently be discoverable.

Know the limitations of client confidentiality. Professional standards in public relations value client confidentiality. This includes both communications between public relations practitioners and clients as well as work product that may be conducted for an organization. However, as the Federal Rules of Civil Procedure, Federal Rules of Evidence, and case law show, public relations-practitioner confidentiality is contingent upon the practitioner's relationship to legal counsel. While internal work product done for a client is almost never shown to the public there should be an expectation that these communications may become public in case of a lawsuit. Similarly, if public relations practitioners find themselves working for a client facing a lawsuit they should take steps to ensure any work product done in relation to that suit is protected. This is done by taking certain steps to establish a relationship between public relations and legal counsel. In fact, this particular issue of confidentiality is an area of public relations that practitioners can use to foster greater organization cohesion between departments.

Preserving data is important and expensive. Public relations practitioners are typically involved in the creation of content, but rarely they need to also think about its preservation. For in-house public relations departments, this may be easy to accomplish because in-house IT departments already take care of ESI storage and maintenance. However, for public relations firms or boutiques this process may be more difficult because there may not be a specific IT department. Smaller public relations practices should investigate how to preserve and maintain ESI that may be discoverable. While it goes without saying that public relations practitioners should avoid the malicious destruction of evidence, they should take note that maintaining records and having

them readily available to clients facing a lawsuit is an important part of practice. Having a system in place will help many public relations practitioners in small practices avoid the hassle and expense of finding data that was not maintained properly.

Practicing international public relations means being subject to different legal standards. U.S. laws are frequently the exception, not the rule, in legal circumstances. Privacy rights, discovery processes, and data storage requirements differ even among nations that regularly do business with American companies. Perhaps one of the biggest issues in this is privacy, and the storage of information. As U.S. organizations frequently have international subsidiaries or offices it is important for public relations practitioners to be aware of what the legal standards are for privacy and storage. After all, legal issues do not always confine themselves to a single jurisdiction, and organizations in the 21st century should be prepared to have litigation arise almost anywhere they have contacts.

Conclusion

Litigation, both actual and anticipated, standard concern for any organization. Given public relations' increasing managerial and communication role in organizations the litigation and discovery process is something that will continue to be of major significance. Public relations practitioners need to not only know the law behind e-discovery, but also understand how and when electronic information is stored and how these laws potentially affect their relationships with clients.

In 20 years, the role and responsibilities of public relations practice has grown both in terms of communication and management. Public relations practitioners should not limit their knowledge exclusively to communication, but as professional standards increasingly suggest they should have a working knowledge of law, business, and technology. Recent cases in the U.S. bear this out. As cases concerning e-discovery show sometimes laws affecting a seemingly unrelated field (even procedural rules) can affect public relations. Because of this it is important for public relations practitioners to watch out for legal developments and consider how they may affect practice. As with all laws and technology, e-discovery will continue to develop in this decade and beyond. Currently in the U.S., ESI and the evidentiary rules that govern it seem to be solidified. Because of this it is relatively manageable to understand the parameters of U.S. e-discovery laws. However, as this paper points out, internationally the role of ESI and litigation is in a state of flux. Privacy regulations and data storage laws are evolving, particularly in the E.U. Because of that it is highly likely that the largest and most important developments in e-discovery will occur outside of the U.S.

Public relations practitioners find themselves in a unique position in the 21st century. Because of their training and expertise, they are equipped to deal with digital communication, and organizations use them to develop social media content. However, because public relations has become so infused with technology it only stands to reason that public relations practice is increasingly intertwined with non- public relations units (i.e. law and IT). E-discovery issues are yet another aspect of the changing nature of communication practice, and the need organizations have to build upon the expertise of multiple components (including public relations) to devise a strategic communication practice.

References

Allied Concrete Co. v. Lester, 736 S.E.2d 699 (Va. 2013).

American Bar Association (n.d.). Model Rules of Professional Conduct. Retrieved from http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html.

Becker, S. (2003). Discovery of Information and Documents from a Litigant's Former Employees: Synergy and Synthesis of Civil Rules, Ethical Standards, Privilege Doctrines, and Common Law Principles, *Nebraska Law Review*, 81, 868-1006.

Bennett, S. (2009-2010). Civil Discovery of Social Networking Information. *Southwestern Law Review*, 39, 413-431.

Browning, J. (2010-2011). Digging for the Digital Dirt: Discovery and Use of Evidence from Social Media Sites. *SMU Science & Technology Law Review*, 14, 465-496.

Chin v. Port Authority of New York & New Jersey, 685 F.3d 135 (2d Cir. 2012).

Cordance v. Amazon.com, 855 F.Supp.2d 244 (D.Del. 2012).

Crispin v. Christian Audigier, Inc., 717 F.Supp. 2d 965 (C.D.Cal. 2010).

*E*Trade Securities LLC v. Deutsche Bank AG*, 230 FRD 582 (D. Minn. 2005).

Federal Rules of Civil Procedure (2016). Retrieved from <http://www.uscourts.gov/sites/default/files/rules-of-civil-procedure.pdf>.

Federal Rules of Evidence. (2016). Retrieved from <http://www.uscourts.gov/sites/default/files/rules-of-evidence.pdf>.

Foret v. Transocean Offshore (USA) LLC, , No. 09-4567, 2010 WL 2732332 (E.D.La. July 6, 2010).

Garrie, D., Duffy-Lewis, M., Gillespie, R, & Joller, M. (2009-2010). Mobile Messaging Making E-Discovery Messy: Mobile Messaging and Electronic Discovery, *Hastings Communication & Entertainment Law Journal*, 32, 103-109.

Grossman, M. & Cormack, G. (2014). Comments on "The Implications of Rule 26(g) on Use of Technology-Assisted Review." *The Federal Law Courts Review*, 7(1), 285-313.

Hazard, G. (1999). Discovery and the Role of the Judge in Civil Law Jurisdictions. *Notre Dame Law Review*, 73(4), 1017-1028.

Hickman v. Taylor, 329 U.S. 495 (1947).

Johnson v. Neiman, No. 4:09CV00689AGF, 2010 WL4065368 (E.D. Mo. Oct. 18, 2010).

Konop v. Hawaiian Airlines, Inc., 302 F.3d 868 (9th Cir. 2002).

Law Enforcement & Third Party Matters. (n.d.). Retrieved from
<https://www.facebook.com/help/473784375984502>.

Metropolitan Opera Association v. Local 100, 212 F.R.D. 178 (S.D.N.Y. 2003).

Moore v. Publicis Groupe, 287 F.R.D. 182 (S.D.N.Y. 2012).

Mulburn, R. (2007). eDiscovery: Are You At Risk?. *Banking Law Journal*, 124, 810-815.

Moure, H. Harrison, B. Marquez-Lechuga, D. & Foggo, G. (2010). E-Discovery Around the World. Retrieved from http://www.mcmillan.ca/Files/ARTICLE_E-Discovery_Around_the_World_0110.pdf.

Muick v. Glenayre Electronics, 280 F.3d 741 (7th Cir. 2002).

Myers, C. (2015). Public relations confidentiality: An analysis of pr practitioner-client privilege in high profile litigation. *Public Relations Review* 41, 14-21. Doi: 10.1016/j.pubrev.2014.10.016.

Nartron Corporation v. General Motors Corporation, No. 232085, 2003 WL 1985261 (Mich Ct. App. Apr. 29 2003).

National Union Fire Insurance of Pittsburgh, Pa. v. Murray Sheet Metal Co., Inc., 967 F.2d 980 (4th Cir. 1992).

Norton Rose Fulbright. (2016). eDiscovery around the globe: 2015 in review. Retrieved from <http://www.nortonrosefulbright.com/files/20160223-ediscovery-around-the-globe-2015-in-review-137422.pdf>.

Oakley, J. (2002/2003). A Fresh Look at the Federal Rules in State Courts. *Nevada Law Journal*, 3, 354-387.

Oppenheimer Fund v. Sanders, 437 U.S. 340 (1978).

Orrell v. Motorcarparts of America, No. 3:06CV418-R, 2007 WL 4287750 (W.D.N.C., June 20, 2016).

Overfield, E. (2013). Shifting the E-Discovery Solution: Why *Taniguchi* Necessitates a Decline in E-Discovery Court Costs. *Penn State Law Review*, 118, 217-242.

Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, 685 F.Supp 456 (S.D.N.Y., 2012).

PRSA Member Code of Ethics (n.d.) Retrieved from
<https://apps.prsa.org/AboutPRSA/Ethics/CodeEnglish/#.WM8pixymvJl>.

Race Tires America Inc. v. Hoosier Racing Tire Corp., 674 F.3d 158 (3d Cir. 2012).

Race Tires America Inc. v. Hoosier Racing Tire Corp., 2011 WL 1748620 (W.D.Pa. May 6, 2011).

Rio Tinto PLC v. Vale S.A., 306 F.R.D. 125 (S.D.N.Y. 2015).

Rowe Entertainment v. William Morris Agency, Inc., 205 F.R.D. 421 (S.D.N.Y. 2002).

Schienenman, K & Gricks, T. (2013). The Implications of Rule 26(g) on Use of Technology-Assisted Review. *The Federal Law Courts Review*, 7(1), 239-274.

Stored Communications Act, 18 U.S.C. §§ 2701-2712 (1986).

Taniguchi v. Kan Pacific Saipan, Ltd., 566 U.S. 560 (2012).

Torres v. Lexington Ins. Co., 237 F.R.D. 533 (D.P.R. 2006).

United States v. Angevine, 281 F.3d 1130 (10th Cir. 2002).

United States v. Nobles, 422 U.S. 225 (1975).

Upjohn v. U.S., 449 U.S. 383 (1981).

Zubulake v. UBS Warburg, 217 F.R.D. 309 (S.D.N.Y. 2003).

¹ Written by the United States Supreme Court and approved by the United States Congress, the Federal Rules of Civil Procedure has been crucial in shaping the civil practice of law in the U.S. since 1938. These rules are first written by the Judicial Conference, a policymaking group consisting of federal judges from U.S. district, appellate, and the Supreme Court.

² It is important to note that states sometime adopt a version of the Federal Rules of Civil Procedure, but have deviations on certain rules. This is why it is important for parties examining e-discovery issues in a state court to recognize that there may be unique e-discovery rules that are specific to that state's jurisdiction. This paper focuses on U.S. federal and some international e-discovery laws.

³ Impeachment is when one party uses information to disprove testimony given by a witness at trial. There are exemptions to these disclosure requirements in Rule 26(a)(1)(B)(i-ix). However, these exemptions are for very specific cases such as administrative cases, forfeitures, habeas

corpus, pro-se litigants in U.S. custody, lawsuits to quash certain court orders, lawsuits for to “recover benefit payments,” lawsuits brought to recover student loans, court hearings “ancillary to a proceeding in another court,” and a lawsuit to “enforce an arbitration award” (Federal Rules of Civil Procedure, 2016, p. 37). It is important to note that these types of proceedings are exempt from these initial disclosures are very specific. If a proceeding does not fall into one of these pre-set categories an initial disclosure must be made.

⁴ Parties who are brought into the lawsuit later must be provided mandatory disclosures within 30 days of joining the lawsuit according Federal Rules of Civil Procedure 26(a)(1)(D).

⁵ Time is always an issue in civil cases, and the Federal Rules of Civil Procedure sets precise mechanisms to manage time in civil suits. At the end of the Rule 26(f) conference the trial court will issue a scheduling order under Rule 16(b). This scheduling order sets the time by which parties must complete discovery, make amendments to the pleadings, file certain motions, and join new parties to the lawsuit. The Federal Rules of Civil Procedure has strict guidelines about the Rule 26(f) meeting as it relates to the scheduling order. Under the Federal Rules of Civil Procedure the Rule 26(f) meeting must take place 21 or more days prior to the scheduling order.

⁶ Under Rule 26(f)(4)(B) a discovery report can be due even earlier than 14 days after the Rule 26(f) conference.

⁷ Overfield (2013) notes that this case and its ultimate appeal signaled a changing approach in e-discovery costs.

⁸ The U.S. District Court for the Southern District of New York is particularly important for PR practitioners because it is a district that contains New York City. Frequently cases involving communication issues come from this U.S. District because so many PR and other communication/media organizations are headquartered in New York City.

⁹ This case overturned some of the analysis in *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities* (2010). In that case the issue involved sanctions for a party who did not provide discoverable materials. In that case the U.S. District Court for the Southern District of New York analyzed the negligence of a party in failing to preserve evidence.

¹⁰ An adverse inference instruction is a judge’s instruction to a jury that a party’s absence or failure to produce evidence should be interpreted adversely to that party.

¹¹ Note that the civil procedure rules involved in this case were those under Virginia, not federal, law. According to Oakley (2002/2003), Virginia’s civil procedure laws have aspects that are dissimilar to the Federal Rules of Civil Procedure.

¹² Despite this behavior the plaintiff still won a jury trial, and the Supreme Court of Virginia held that the defendant was not entitled to a new trial based on the social media misconduct of the plaintiff and his lawyer.

¹³ Browning (2011) notes that there have been several state bar associations that analyzed whether lawyers or their employees who have attempted to gain access to social media accounts through surreptitious means violate professional conduct rules.

¹⁴ Bennett (2009-2010) provides a more in-depth analysis of the Stored Communications Act (SCA) and how it applies to employee communication. He points out that in at least one case from the U.S. Court of Appeals for the Ninth Circuit the court held that requiring employees to disclose personal online information to an employer would violate SCA (*Konop v. Hawaiian Airlines, Inc.* 2002).

¹⁵ Civil code jurisdictions differ from common law jurisdictions mainly in their treatment of case law and statutes. In civil code jurisdiction statutes are the primary way law is applied whereas in common law jurisdictions case law, or courts' previous decisions, are also treated as controlling law.